92-549

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

DON ATER - - - - - - - - - Petitioner

versus

DAVID ARMSTRONG and
LEON E. JONES, SR. - - - - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Is Kentucky Revised Statutes 189.570(21), which allows pedestrians to solicit contributions from passing motorists, so long as they use adequate warning lights, but which bars all other forms of speech by pedestrians to passing motorists, including the distribution of literature, an unconstitutional regulation of public forum speech which is not narrowly tailored to serve a legitimate governmental interest?

PARTIES

The petitioner in this Court is Don Ater, who was the plaintiff-appellant below. The respondents in this Court, who were the defendants-appellees below, are David Armstrong, in his official capacity as Jefferson County Judge/Executive, and Leon E. Jones, Sr., in his official capacity as Jefferson County Police Chief.

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1. *Ater* v. *Armstrong*, Civil Action No. C87-0715-L(J) (W.D. Ky., 11/29/89).
2. *Ater* v. *Armstrong*, 961 F.2d 1224 (6th Cir. 1992).

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DON ATER - - - - - - - - - - - *Petitioner*

v.

DAVID ARMSTRONG and
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JURISDICTION

The United States Court of Appeals issued its opinion on April 17, 1992 [*Ater* v. *Armstrong*, 961 F.2d 1224 (6th Cir. 1992)], affirming the decision of the United States District Court.

On June 26, 1992, the Court of Appeals denied the appellant's petition for a rehearing [*Ater* v. *Armstrong*, No. 90-5424, Order Denying Rehearing en Banc (6th Cir. 6/26/92)].

The jurisdiction of this Court to review this Petition for Writ of Certiorari is invoked under Title 28, United States Code, Section 1254(1) and in conformity with Title 28, United States Code, Section 2101(c) and Supreme Court Rules 13 and 14.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE

This case involves Amendment I to the Constitution of the United States, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This case also involves Kentucky Revised Statutes 189.570(21), which provides:

> No person shall stand on a highway for the purpose of soliciting contributions unless such soliciting is designated by the presence of a traffic control device or warning signal or an emergency vehicle or public safety vehicle as defined in KRS 189.910 making use of the flashing, rotating or oscillating red, blue, or yellow lights on such devices or vehicles.

STATEMENT OF THE CASE

This is a first amendment case brought under 42 U.S.C. § 1983.[1] The petitioner, Don Ater (Ater), seeks declaratory and injunctive relief in this facial challenge to Kentucky Revised Statutes (KRS) 189.570(21). Ater seeks to preclude police enforcement of the statute to bar his distribution of political literature to passing motorists.

The facts in this case are simple and undisputed. Ater, a Ku Klux Klan member, wished to distribute political

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[1]District Court jurisdiction was based on 28 U.S.C. § 1331, which provides for federal question jurisdiction. The first amendment applies to the states through the fourteenth amendment's due process clause. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940).

literature to motorists in Jefferson County, Kentucky, while using adequate warning lights.

In response to a letter from Ater, Police Chief Bobby Crouch[2] stated that Ater's proposed conduct was barred by KRS 189.570. Crouch explained his reasoning in a June 30, 1987 letter, and indicated that police would enforce the statute to bar Ater's distribution of literature.

KRS 189.570 generally bars pedestrians from the roadway, except when lawfully crossing the street or walking along the shoulder. Subsection 21 provides the only exception:

> (21) No person shall stand on a highway for the purpose of soliciting contributions unless such soliciting is designated by the presence of a traffic control device or warning signal or an emergency vehicle or public safety vehicle as defined in KRS 189.910 making use of the flashing, rotating or oscillating red, blue, or yellow lights on such devices or vehicles.

No similar "warning signal" exception allows pedestrians to distribute literature, carry placards or otherwise engage in expressive speech or conduct.

Ater filed suit against Sloane and Crouch (collectively the county) on November 24, 1987. He alleged that police enforcement of KRS 189.570 to preclude his distribution of political literature deprived him of first and fourteenth

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[2]Police Chief Crouch and Jefferson County Judge/Executive Harvey Sloane held office when Ater filed his complaint. Their respective successors, Leon E. Jones, Sr. and David Armstrong, were substituted as defendants pursuant to Fed.R.Civ.P.25, since Ater's official capacity suit is tantamount to suing Jefferson County itself. *See, e.g., Will* v. *Michigan Dept. of State Police*, 109 S.Ct. 2304, 2311 n.10 (1989); *Welch* v. *State Dept. of Highways*, 483 U.S. 468 (1987).

amendment rights because the statute was a content-based restriction on speech and was not narrowly tailored to achieve its legitimate ends.[3] Ater sought declaratory and injunctive relief.

On February 22, 1990, the district court entered its final judgment upholding the statute, for reasons contained in its November 29, 1989, memorandum opinion. The court held that the statute was content-neutral and was narrowly tailored to achieve legitimate ends.

A divided panel of the Sixth Circuit affirmed on April 17, 1992. Citing *United States* v. *Kokinda*, 110 S.Ct. 3115 (1990), the majority concluded that the distinction between solicitation and other forms of expression does not discriminate on the basis of content or viewpoint. The majority concluded that, even if underinclusive, the statute was a reasonable time, place and manner restriction which promoted the legitimate goal of roadway safety.

Judge Krupansky dissented. Like the majority and the district court, he first noted that the statute restricts free expression in a traditional public forum and that the county bears the burden of justifying its restriction on speech. He noted that, even if the county needed to meet only the less burdensome standard for content-neutral restrictions on speech, those restrictions must be narrowly tailored to serve a significant governmental interest. Judge Krupansky

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[3]Ater made two additional arguments which he did not pursue on appeal. He claimed that the statute did not bar his proposed conduct and that police selectively enforced the law. The first claim, like the one pursued on appeal, involved only questions of law. The second claim involved questions of fact; Ater voluntarily dismissed the claim to allow entry of a final judgment.

concluded that this statute could not be considered narrowly tailored and could not be deemed to serve a significant governmental interest, because it allows the most dangerous form of pedestrian speech while banning all less dangerous forms.

Judge Krupansky further concluded that the statute could not be deemed content-neutral, since it distinguished between permitted and prohibited expression based solely on the subject matter of that expression: a plea for an instantaneous contribution of money was permitted, while a plea for future direct contributions (i.e., writing a check) or future indirect contributions (i.e., through organizational membership) was prohibited. Finally, Judge Krupansky concluded that the statute impermissibly vested unfettered discretion in local police to determine what constitutes "solicitation," so as to be permitted under the statute.

While Ater's timely petition for rehearing was pending, this Court decided *Burson* v. *Freeman*, 112 S.Ct. 1846 (1992). The Sixth Circuit directed the parties to file supplemental arguments addressing *Burson* and, on June 26, 1992, entered an order denying rehearing. The Sixth Circuit thus did not have the benefit of *ISKCON* v. *Lee*, decided by this Court the same day.

ARGUMENT

I. The Sixth Circuit's Opinion Conflicts With This Court's Decision In *ISKCON* v. *Lee*.

In *Intern. Soc. for Krishna Consciousness* v. *Lee (ISKCON)*, 112 S.Ct. 2711 (1992), decided the same day that the Sixth Circuit denied rehearing here, this Court upheld a ban on the solicitation of contributions at New York City area airports, but struck down a similar ban on

the distribution of literature. Four members of the Court deemed the airport to be a public forum and applied heightened scrutiny to strike the ban. *Id.* at 2715-20 (Kennedy, J., concurring in the judgment); *see id.* at 2724-25 (Souter, J., Blackmun, J., and Stevens, J., concurring).

Justice O'Connor furnished the fifth vote. Although she concluded that an airport was not a public forum, the ban failed even the more deferential test for "reasonableness." *Id.* at 2712 ("restrictions on speech in nonpublic fora are valid only if they are reasonable . . .")(internal quotation omitted). Assessing the reasonableness of the governmental restriction "in light of the purpose of the forum and all the surrounding circumstances," *ibid.* (internal quotation omitted), Justice O'Connor deemed that the airport's choice to open its grounds to nontravellers and for purposes other than travel defied its assertion that distribution of literature would interfere with the orderly business of travellers. "We have said that a restriction on speech in a nonpublic forum is 'reasonable' when it is 'consistent with the [government's] legitimate interest in 'preserv[ing] the property . . . for the use to which it is lawfully dedicated.' " *Ibid. (quoting Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 50-51 (1983)).

Limitations on public forum speech are subjected to more exacting scrutiny than that of "reasonableness". But the restriction here fails even the "reasonableness" test applied to a nonpublic forum, for precisely the reasons relied on by Justice O'Connor. Kentucky unquestionably has a reasonable basis for preserving its streets for automotive travel. Ater does not dispute that, consistent with that reasonable basis, Kentucky may ban all pedestrian-to-motorist speech in the roadways. Or it may, through a

narrowly tailored restriction serving its legitimate purpose, limit some (but not all) speech.[4]

But here the statute turns reason on its head. Every court that has upheld restrictions on solicitation without similar restrictions on the distribution of literature has done so because of the greater hazards posed by solicitation. *See Kokinda*, 110 S.Ct. at 3123-25; *Heffron* v. *Intern. Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 653 (1981).[5] KRS 189.570 permits the form of speech which most jeopardizes public safety but, in the interest of public safety, bans all less hazardous speech.

The Sixth Circuit did not have the benefit of this Court's decision in *ISKCON*. That case makes clear that the panel's failure to assess even the reasonableness of the statute's distribution ban in light of its express permission

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[4]Two examples will suffice. Kentucky may limit solicitation of contributions from passing motorists because the unique hazards posed by this form of speech are inconsistent with the purpose to which the roadway is dedicated. *See Kokinda*, 110 S.Ct. at 312 (dedicated sidewalk between parking lot and post office); *see also ISKCON*, 112 S.Ct. at 2713 (O'Connor, J., concurring) ("face-to-face solicitation is incompatible with the airport's functioning in a way that the other, permitted activities are not"). It may also limit both solicitation and distribution because of the unique hazards posed by physical interaction between pedestrians and motorists.

[5]The circuit courts have justified restrictions on solicitation similarly. *See Intern. Soc. for Krishna Consciousness, Inc.* v. *Baton Rouge*, 876 F.2d 494, 498 (5th Cir. 1989); *ACORN* v. *City of Phoenix*, 798 F.2d 1260, 1269 (9th Cir. 1986); *United States Labor Party* v. *Oremus*, 619 F.2d 683, 688 (7th Cir. 1980).

for solicitation is a fatal flaw.[6] Similarly, the county has failed on this record to show any reason "why the Kentucky statute excepts solicitation from the general prohibition . . ." *Ater*, 961 F.2d at 1228 n.4. *ISKCON* compels the conclusion that this partial limitation on public forum speech does not serve a significant governmental interest in roadway safety, because it permits the most dangerous form of speech while banning all less dangerous forms. Where, as here, a legislature bans less dangerous speech while—in the interest of safety—it permits the most dangerous speech, it has acted wholly irrationally. An irrational distinction is unconstitutional under *ISKCON* not because of simple underbreadth, but because it by definition does not serve the government's asserted interest.

II. The Sixth Circuit's Upholding of a Time, Place or Manner Restriction on Public Forum Speech in the Absence of Any Proof or Articulation of Unique Hazards Posed by That Speech Is Inconsistent With This Court's Decisions in *United States* v. *Kokinda*, 110 S.Ct. 3115 (1990), *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490 (1981), and *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

The Sixth Circuit deemed the statute content-neutral. Even assuming that the distinction between solicitation and distribution of literature is "content-neutral" (a conclusion that finds some support in *Kokinda*), it is still subject to time, place and manner review. That review,

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[6]Ater does not argue that the "reasonableness" standard governs limits on public forum speech. But, for the reasons airport restrictions on nonpublic forum distribution of literature are not reasonable, Kentucky's restrictions are not reasonable here. They thus cannot survive the more exacting scrutiny for public forum restrictions.

although deferential, has always called for at least some independent judicial scrutiny of political line-drawing.

Thus, even in a *non*-forum, five members of the *Kokinda* Court took pains to explain the unique hazards that in-person solicitation posed to the effective operation of the postal service, and the decision further referred to the postal service's well-documented experiences with such hazards. And, as described in § I, above, a five member Court in *ISKCON* struck down an airport regulation banning the distribution of literature, even though a different five member Court concluded that the airport was not a public forum.

Here, the Sixth Circuit rejected arguments that the statute was fatally underinclusive in permitting the most dangerous form of pedestrian speech, but banning all less dangerous forms. The Court reached this conclusion by borrowing "the rational relation standard of equal protection analysis." *Ater,* 961 F.2d at 1239 n.8 (Krupansky, J., dissenting). Whatever the vitality of that standard in a non-forum after *Kokinda,* it has never been the standard applied to time, place and manner restrictions in a public forum.

Thus, in *Metromedia, Inc.* v. *City of San Diego,* 453 U.S. 490 (1981), the Court struck down portions of a billboard ordinance which banned some, but not all, billboards. A four member plurality rejected "deferring to merely rational legislative judgments in [the first amendment] area:

> Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and

> to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

Id. at 519-20 (*quoting Schneider* v. *State*, 308 U.S. 147, 161 (1939)). The plurality therefore declined to defer to San Diego's asserted interests in esthetics and traffic safety. *Metromedia*, at 520. Two members concurred on this precise point:

> [B]efore deferring to a city's judgment, a court must be convinced that the city is seriously and comprehensively addressing aesthetic concerns with respect to its environment. Here, San Diego has failed to demonstrate a comprehensive coordinated effort . . . In this sense the ordinance is underinclusive.

Just as San Diego's articulated reason for its selective ban on billboards was subjected to, and failed, judicial scrutiny, the reasons for the statutory underinclusiveness here must be subjected to judicial scrutiny. But the Sixth Circuit has not only failed to scrutinize Kentucky's reasons, it has admitted that "[i]t is unclear why the Kentucky statute excepts solicitation from the general prohibition . . ." *Ater*, 961 F.2d at 1228 n.4.

Similarly, in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Court struck down federal statutory limits on campaign expenditures after assessing "whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.* at 45.

Whether upholding or striking restrictions on public forum speech, then, this Court consistently demands that the legislation target a unique hazard and that the underinclusive legislation take aim at it. By failing to adhere to *Kokinda*, *Metromedia* and *Buckley*, the Sixth

Circuit never assessed the underinclusiveness of the statutory ban in light of the state's articulated interest in highway safety. Any such assessment must conclude that a classification that permits the most dangerous pedestrian speech, but no less dangerous speech, does not thereby serve the interest of highway safety.

III. The Sixth Circuit's Analysis of Content-Neutrality Cannot Survive This Court's Decision in *Burson* v. *Freeman.*

After issuance of the Sixth Circuit's decision, but before ruling on the petition for rehearing, this Court decided *Burson* v. *Freeman,* 112 S.Ct. 1846 (1992). The Sixth Circuit nevertheless denied rehearing, apparently concluding that *Burson* did not undermine its reasoning.

For the following reasons, both the plurity and dissent in *Burson* adopt reasoning central to the dissent-below, and expressly reject reasoning central to the majority (and district court) opinion.

KRS 189.570 restricts speech in a traditional public forum. Central to any analysis of restrictions on speech in a public forum is the content-neutrality of those restrictions. Content-neutral restrictions are subjected to less exacting scrutiny: they will be upheld as reasonable time, place and manner regulations so long as they are "narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication." *Burson,* 112 S.Ct. at 1850. Content-based restrictions are subjected to more exacting scrutiny: they will be upheld only so long as they are necessary to serve a compelling governmental interest and narrowly tailored to serve that interest. *Id.*

Here, the panel concluded that Kentucky's statutory bar on the distribution of literature by pedestrians to motorists[7] is "content neutral on its face." *Ater*, 961 F.2d at 1227.

> Because the statute prohibits *all* parties from distributing literature in the roadways, and because it permits *all* parties to solicit contributions in the roadways if the precautions prescribed by subsection 21 are undertaken, the statute applies evenhandedly to all those who wish to distribute written materials or solicit funds. For example, both the Ku Klux Klan and the NAACP are barred from distributing their literature to motorists, regardless of their diverse viewpoints or the informational content of their messages. Both organizations, however, could solicit for contributions, provided that each meets the safety requirements set forth in subsection 21 of the statute.

Id. (emphasis in original). The court then swiftly concluded that the statute does not discriminate on the basis of content or viewpoint and, although "arguably . . . underinclusive", was not fatally so.

The court's content-neutrality analysis, which dictated the level of scrutiny applied, cannot survive *Burson*. There, this Court rejected a first amendment challenge to a Tennessee law prohibiting electioneering or the display of campaign materials within 100 feet of a polling place. Four

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[7]The statute bars not only the distribution of literature, but all communication by pedestrians to motorists except the solicitation of contributions. It thus bars pedestrians, using the same safety devices as solicitors of contributions, from speaking to motorists through bull horns, directing written messages to them by displaying placards, or symbolically speaking to them by holding a silent vigil. *See Ater*, 961 F.2d at 1231 (Krupansky, J., dissenting).

Justices (Justice Blackmun, joined by Chief Justice Rehnquist and Justices White and Kennedy) concluded that the statute was content-based, *Burson*, 112 S.Ct. at 1850, but survived exacting scrutiny because it was narrowly tailored to serve the compelling governmental interest in ensuring fair and orderly elections. *Id.* at 1851-52. Justice Scalia agreed that the law was content-based, but concurred on the grounds that the area around a polling place is a limited public forum on election day, not a traditional public forum, and thus should not be subjected to exacting scrutiny. *Id.* at 1859-60. Justices Stevens, O'Connor and Souter dissented, concluding that this law was not narrowly tailored to meet the exacting scrutiny required by its content-based restriction on speech in a public forum. *Id.* at 1861-66. *See also id.* at 1858-59 (Kennedy, J., concurring) (restriction on speech should be deemed content-neutral if justified without reference to content of that speech).

Thus, all eight Justices (Justice Thomas took no part in the decision) agreed that the Tennessee statute was content-based, not content-neutral. The court's plurality opinion sheds useful light on the continued vitality of reviewing restrictions on public forum speech for their *content* neutrality, not just their *viewpoint* neutrality:

> The Tennessee restriction under consideration, however, is not a facially content-neutral time, place, or manner restriction. Whether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech, such as commercial solicitation, distribution, and display. This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic.

Burson, 112 S.Ct. at 1850.

This analysis thus rejects the *Ater* majority's content-neutrality finding on the basis that "[t]he solicitation of money and the distribution of literature are two different categories of speech . . ." *Ater*, 961 F.2d at 1227. Indeed, to paraphrase the portion of *Ater* quoted above, the Tennessee law permits all parties—the Ku Klux Klan and the NAACP; the Republicans and the Democrats—to engage in non-electoral speech around the polling places. It "evenhandedly" bars those same parties from electioneering or displaying campaign materials around the polling places.

In *Ater*, the lawfulness of pedestrian speech to motorists depends exclusively on the content (not viewpoint) of that speech. So long as the message is "please contribute," the speech is permitted; if the message is anything else, including "please agree with my politics," the speech is barred.[8] *Burson* leaves room for no other conclusion than that this is a content-based restriction on speech subject to exacting scrutiny.

Burson also makes clear that exacting scrutiny does not always condemn content-based restrictions on speech in a public forum. While a bare 4-3 plurality of this Court held that the Tennessee statute was necessary and narrowly tailored to serve a compelling governmental interest (Justice Scalia concurred on other grounds), *Ater* compels a different conclusion. Rather than banning all pedestrian-to-motorist speech in the interest of highway safety, or even banning all physical contact (resulting from solicitation of

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[8]Judge Krupansky accurately notes that solicitation can be in oral or written form, *Ater*, 961 F.2d at 1231 (Krupansky, J., dissenting), and can seek present or future contributions. The line between solicitation and distribution is thus hazy at best.

contributions or distribution of literature) between pedestrians and motorists, because that is the most dangerous form of speech, *see United States* v. *Kokinda*, 110 S.Ct. 3115, 3123-25 (1990), the Kentucky statute bans all forms of speech except the most dangerous. This not only defies logic, it does not "serve" the governmental interest. (It follows that a classification which does not serve an interest cannot be narrowly tailored to serve that interest.)

To return to the Tennessee statute at issue in *Burson*, it is as if, to serve Tennessee's compelling interest in fair and orderly elections, the state banned all electioneering in a zone from 25 to 100 feet from the polling place, but permitted electioneering within 25 feet and at a distance greater than 100 feet. This Court would surely have stricken that statute. Yet that is precisely what Kentucky has done here: in the interest of highway safety, it has banned all but the most dangerous form of pedestrian speech. This cannot be deemed narrowly tailored to serve a compelling governmental interest, as it must be to survive exacting scrutiny of a content-based restriction on public forum speech. It is not even narrowly tailored to "serve" a significant governmental interest, as it must be to survive scrutiny of content-neutral restrictions on public forum speech.

CONCLUSION

For these reasons, The Sixth Circuit has decided a federal question in a way that conflicts with applicable decisions of this Court. The petition for a writ of certiorari should therefore be granted. In the alternative, this Court should grant the petition for a writ of certiorari, vacate the decision below, and remand the case for reconsideration in light of *ISKCON* v. *Lee*.

Respectfully submitted,

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APPENDIX

No. 91-5140

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DON ATER, - - - - - - - *Plaintiff-Appellant,*

v.

DAVID ARMSTRONG;
LEON E. JONES, SR. - - - - *Defendants-Appellees.*

ORDER—Filed June 26, 1992

BEFORE: MILBURN, Circuit Judge; BROWN and KRUPANSKY, Senior Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 90-5424

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DON ATER,
Plaintiff-Appellant,

v.

DAVID ARMSTRONG and
LEON E. JONES, SR.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Kentucky

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Decided and Filed April 17, 1992

Before: MILBURN, Circuit Judge; and BROWN and KRUPANSKY, Senior Circuit Judges.

BROWN, Senior Circuit Judge, delivered the opinion of the court, in which MILBURN, Circuit Judge, joined. KRUPANSKY, Senior Circuit Judge (pp. 12-35), delivered a separate dissenting opinion.

BAILEY BROWN, Senior Circuit Judge. Plaintiff, Don Ater ("Ater"), appeals from the district court's grant of summary judgment in favor of Defendants, David Armstrong, Jefferson County, Kentucky Judge/Executive,

and Leon E. Jones, Sr., Jefferson County Police Chief.[1] Ater, a Grand Dragon of the Realm of the Kentucky Invisible Empire, Knights of the Ku Klux Klan, sought to distribute political literature while standing on medians or on Jefferson County, Kentucky roadways. Bobby Crouch, who was then Jefferson County Police Chief, denied permission for such distribution under Kentucky Revised Statutes ("KRS") section 189.570, and Ater sued, challenging the constitutionality of the statute as interpreted. For the reasons that follow, we affirm the district court's grant of Defendants' motion for summary judgment on this issue.

I

During 1987, Ater sought to distribute political literature while standing on medians or on Jefferson County, Kentucky roadways. Where there was no median, Ater planned to use flashing warning lights. Ater sought permission from then Jefferson County Police Chief Bobby Crouch ("Crouch"). On June 30, 1987, Crouch notified Ater that KRS 189.570 prohibited the proposed conduct. Ater contends that then Jefferson County Judge/Executive Harvey Sloane participated in the interpretation of the statute.

As interpreted, KRS 189.570 generally prohibits persons from standing in the roadways, including the medians. Subsection 21, however, carves out an exception to this rule:

> No person shall stand on the highway for the purpose of soliciting contributions unless such soliciting is designated by the presence of a traffic control device or warning signal or an emergency

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[1] Armstrong and Jones were substituted for Harvey Sloane and Bobby Crouch, who respectively held the positions of Jefferson County Judge/Executive and Police Chief at the time Ater filed his complaint. Ater sued these defendants in their official capacities, which is tantamount to suing Jefferson County itself. *See Brandon v. Holt*, 469 U.S. 464, 471-72 (1985).

> vehicle or public safety vehicle as defined in KRS 189.910 making use of the flashing, rotating or oscillating red, blue or yellow lights on such devices or vehicles.

KRS 189.570(21).

During November of 1987, Ater sued Crouch and Sloane in their official capacities, seeking declaratory and injunctive relief under 42 U.S.C. § 1983. He claimed that Defendants' interpretation and application of the statute violated his speech and association rights guaranteed by the First and Fourteenth Amendments.

Ater moved for partial summary judgment, and the district court denied his motion on November 28, 1989. The district court stated:

> When this statute is read in its entirety, it is clear that the legislature chose to have only one exception [i.e., to solicit contributions]. Pedestrians are restricted to the sidewalk if it is available; if not, then to the shoulder. If no shoulder, they must remain as far as practicable from the edge of the road. It seems logical therefore that the statute prohibits standing or walking on the median to distribute literature.[2]

The district court held that the statute is a content-neutral restriction on speech because the exception, which allows the solicitation of contributions but not the distribution of literature, "is based on the type of activity, not the content or view of the speech." It further determined that the prohibition is narrowly tailored to serve a significant government interest and that it leaves open ample alternative channels of communication. The district court concluded, based upon these determinations, that the

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[2]It was part of Ater's contention that, properly interpreted, the statute did not apply to the distribution of literature while standing on a median.

prohibition did not violate Ater's rights under the First and Fourteenth Amendments.

In response to the district court's denial of Ater's motion for partial summary judgment, Defendants moved for partial summary judgment. The district court granted this motion for the same reasons it denied Ater's motion. Ater voluntarily dismissed with prejudice his remaining claim of selective enforcement and now appeals from the final order of the district court.

II

The issues on appeal may be succinctly framed. No party denies that the distribution of literature is speech protected by the First and Fourteenth Amendments. Defendants contend that the statute imposes a reasonable time, place, and manner restriction that is content neutral, is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). In response, Ater contends that the prohibition is a content-based restriction that is neither necessary to serve a compelling state interest nor narrowly drawn to achieve that end. *See Frisby v. Schultz*, 487 U.S. 474, 481 (1988). Alternatively, Ater contends that even if the prohibition were content neutral, it is not narrowly tailored to serve the state's legitimate interest in highway safety.

A

We first briefly discuss the nature of the forum at issue. There can be no doubt that the streets of Jefferson County, Kentucky, are traditional public fora. "No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby*, 487 U.S. at 481. The government's ability to restrict expressive conduct in traditional public fora is

quite limited. *See United States v. Grace*, 461 U.S. 171, 177 (1983).

It is equally clear, however, that the government may impose reasonable time, place, and manner restrictions on protected conduct, even in traditional public fora. Such restrictions comport with the strictures of the First Amendment so long as they (1) are justified without reference to the content of the speech (content neutrality), (2) are narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication of the information. *Rock Against Racism*, 491 U.S. at 791. Because Ater concedes the existence of ample alternative channels for communication, the remainder of this opinion is concerned with the first two requirements of the above standard.

B

Ater first contests the district court's conclusion that the prohibition is content neutral. The Supreme Court has held that, to be content neutral, a restriction "'may not be based upon either the content or subject matter of [the] speech.'" *Heffron v. Int'l Soc. of Krishna Consc.*, 452 U.S. 640, 648 (1981) (quoting *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 536 (1980)). The central inquiry with respect to content neutrality is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys," *Bamon Corp. v. City of Dayton*, 923 F.2d 470, 473 (6th Cir. 1991) (citation omitted), or because of a desire to suppress information. The restriction must apply "even-handedly to all who wish to distribute and sell written materials or to solicit funds." *Heffron*, 452 U.S. at 649. The restriction, moreover, must not "suffer from the more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority." *Id.*

The Kentucky statute, KRS 189.570, is content neutral on its face. Because the statute prohibits *all* parties from distributing literature in the roadways, and because it permits *all* parties to solicit contributions in the roadways if the precautions prescribed by subsection 21 are undertaken, the statute applies evenhandedly to all those who wish to distribute written materials or solicit funds. For example, both the Ku Klux Klan and the NAACP are barred from distributing their literature to motorists, regardless of their diverse viewpoints or the informational content of their messages. Both organizations, however, could solicit for contributions, provided that each meets the safety requirements set forth in subsection 21 of the statute.

Ater contends, however, that the local officials designated the individuals who have been allowed access to Kentucky's roadways. This selective designation, Ater contends, is based on the content of the message. We disagree. The statute does not vest the officials with such arbitrary discretion. The statute, as interpreted and applied, provides that *all* parties are prohibited from disseminating literature but, provided the lighting safeguards of subsection 21 are met, are permitted to solicit contributions. The county officials' interpretation and application of the statute, therefore, were not based on the content of Ater's message.[3]

Ater also contends that a recent opinion of this court undercuts the content-neutral characterization of Kentucky's disparate treatment of distribution of literature and solicitation for contributions. *See Discovery Network v. Cincinnati*, No. 90-3817, slip op. at 13-14 (6th Cir. Oct. 11, 1991). In *Discovery Network*, we concluded that a Cincinnati ordinance prohibiting the newsrack distribution of "commercial" publications (such as

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[3]We note that, although Ater contended below that the statute did not bar the conduct he proposed and that the statute was selectively enforced, he expressly abandoned both of those contentions on this appeal.

magazines listing real estate for sale), but allowing such distribution of "non-commercial" publications (which had been interpreted and applied to cover newspapers), was a content-based restriction that violated the First Amendment as incorporated by the Fourteenth Amendment. "The ordinance treats newsracks differently on the basis of the commercial content of the publications distributed." *Discovery Network*, slip op. at 14.

In contrast, the Kentucky statute that Ater challenges is content neutral. It is aimed at the noncommunicative impact of the conduct (the creation of unsafe conditions on Kentucky's roadways); it is not motivated by a governmental intent to suppress ideas or information. The ordinance at issue in *Discovery Network* was facially aimed at the suppression of a particular type of information: that contained in "commercial" publications. The Kentucky statute does not suffer from such a defect.

The solicitation of money and the distribution of literature are two different categories of speech, each of which enjoys protection under the First Amendment. *See Heffron*, 452 U.S. at 647. As this court recently noted:

> "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some . . . messages but not others." (Citation omitted). Regulations that apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech are properly characterized as content-neutral, as long as the regulations are justified without reference to the content of that speech.

Bamon Corp. v. City of Dayton, 923 F. 2d 470, 473 (6th Cir. 1991) (citing *Boos v. Barry*, 485 U.S. 312, 320 (1988)). The goal of the Kentucky statute is to promote public safety in the roadways. The officials' application of the statute was not based on the content of any message.

Finally, the Supreme Court recently discussed a regulation that prohibited solicitation but allowed other expressive conduct. It held that "[c]learly, the regulation does not discriminate on the basis of content or viewpoint." *United States v. Kokinda*, 110 S. Ct. 3115, 3124 (1990).[4] Similarly, the Kentucky statute, which allows solicitation but prohibits other expressive conduct, does not discriminate on the basis of content or viewpoint. Thus, the district court correctly concluded that the statute imposes a content-neutral restriction on speech.

C

Ater also argues that the statute is not narrowly tailored to serve a significant governmental interest. Although he concedes Kentucky's legitimate interest in the safe and orderly flow of traffic on its roadways, Ater argues that the statute "is so broad in its sweep as to infringe upon speech unrelated to the identified purpose." He also argues that "the *Discovery Network* court's analysis of the

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[4]The dissent cites *United States v. Kokinda*, 110 S. Ct. 3115 (1990), for the proposition that solicitation presents a greater traffic and safety hazard than distribution of literature. It fails to note that, in *Kokinda*, five members of the Supreme concluded that a content-neutral distinction could be made between solicitation and distribution of literature. In *Kokinda*, the Postal Service barred solicitation on its sidewalks because of its desire to facilitate customers' postal transactions. *See Kokinda*, 110 S. Ct. 3124. Similarly, the Kentucky statute bars most expressive conduct because of Kentucky's desire to provide safe and uncongested roadways. In *Kokinda*, the failure of the Postal Service to bar other forms of expressive conduct did not lead to the conclusion that the regulation was content based. Similarly, Kentucky's failure to bar solicitation does not support the dissent's erroneous conclusion that the statute, as interpreted and applied, is content based.

It is unclear why the Kentucky statute excepts solicitation from the general prohibition of pedestrian activities upon its roads. But it absolutely defies reason to hold that Kentucky excepted solicitation because it wished to suppress certain ideas, information, viewpoints, or otherwise impose a content-based restriction on speech. Because anyone, from the Ku Klux Klan to the NAACP, may solicit but no one may undertake other expressive conduct in Kentucky's roads, the exception leaves all content on equal footing. A content-based motive cannot be logically inferred from this exception.

'reasonable fit' between Cincinnati's asserted ends and its chosen means . . . is analogous to Ater's argument. . . ."

In *Discovery Network*, we cited *Rock Against Racism*, 491 U.S. 781, for the proposition that a time, place, and manner restriction of speech must be narrowly tailored. *Discovery Network*, slip op. at 16 n.14. *Rock Against Racism* supports the conclusion that the Kentucky statute challenged by Ater, which arguably is underinclusive because it allows the solicitation of funds, meets this requirement:

> So long as the means chosen are not substantially *broader* than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. "The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests" or the degree to which those interests should be promoted.

Rock Against Racism, 491 U.S. at 800 (emphasis added) (alteration in original)(quoting *United States v. Albertini*, 472 U.S. 677, 689 (1985)).

The district court held, and we agree, that the Kentucky statute is intended to promote the legitimate goal of safety in the roadways. By prohibiting the distribution of literature in the roadways, the statute eliminates no *more* activity than was considered necessary. Kentucky's legitimate interest in safety would support the prohibition of all pedestrian activities on its roadways, even the solicitation of funds, which it has chosen to except from the prohibition. For this reason, we agree with the district court's conclusion that the statute's failure to prohibit solicitation of funds in the roadways does not render it unconstitutional. *See Rock Against Racism*, 491

U.S. at 800; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975) (problems of underinclusiveness are rarely problems of constitutional magnitude, unless they signify an impermissible discriminatory motive). Although we might question the wisdom of excepting solicitation from the general prohibition, our questions relate to the degree and method that Kentucky has chosen for the promotion of its legitimate interest in safe and uncongested roads.

The dissent contends that the underinclusiveness of the statute raises serious doubts about its true objective and renders it impossible to determine whether the statute targets no more than the source of the evil it seeks to remedy. The Supreme Court has shown great reluctance to make First Amendment-related speculations on the hidden motives of legislative bodies. *See United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). Although this statute presents an underinclusive remedy, it clearly serves the state's interest in avoiding traffic congestion and fostering road safety. It cannot be doubted that Kentucky has the power to limit pedestrian activities upon its roadways. We cannot believe, as the dissent apparently would have us hold, that Kentucky prohibited nearly all forms of pedestrian activity upon its roads, excepting only solicitation, because it wished to censor expression. Its reason clearly was safety.[5]

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[5]The dissent would require a legitimate government interest that justifies the exception of solicitation from the general proscription of pedestrian activity on the roads. The legitimate government interest need only justify the general prohibition of protected activity; so long as its distinctions are content neutral, it need not justify the allowance of some expression. The government's interest in safety and the avoidance of traffic congestion adequately supports the statute's prohibition of pedestrian activities on Kentucky's roads. Unless a prohibition is content based, we examine the legislature's motive for prohibiting the forms of conduct it chooses to prohibit, not its motive for excepting other forms of conduct from the prohibition.

D

The district court also correctly found that there are ample alternative channels of communication, a determination that Ater does not dispute.

III

Because we hold that the statute is not an unconstitutional restriction on Ater's speech, we **AFFIRM** the district court's grant of summary judgment in favor of the defendants.

KRUPANSKY, Senior Circuit Judge, dissenting. The single justification for endorsing the constitutional validity of subsection (21) of Kentucky Revised Statute (KRS) section 189.570 and its regulation of first amendment rights of free expression in a public forum hangs on the fragile thread of its articulated purpose of promoting a significant public interest, in this case, the protection of motorists and pedestrians from the hazards inherent to their interacting activities while jointly using the roadways of Kentucky. *Absent that justification, the constitutional challenge to section (21) as an infringement of first amendment rights to free expression in a public forum must prevail.*[1]

Recognizing the lesser burden of the state to support the constitutionality of a statute that is *content neutral* as

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[1]The parties and the panel majority are in accord that the public forum here in controversy, i.e., the active roadways of Kentucky, is one which "by long tradition or by government fiat ha[s] been devoted to assembly and debate," *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 954 (1983), and as public streets and roadways "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 5151, 59 S. Ct. 954, 963 (1939). Accordingly, it is within this agreed context that the dissent addresses this appellate review.

Although not joined as an issue in this appeal, the character of the forum to which plaintiff seeks access appears to present an area of interesting academic inquiry. It is difficult to envision today's interstate high-speed highways, three, four, or more laned heavily traveled county and municipal roadways, and streets congested with moving vehicular traffic, all of which are embraced within the broad language of KRS section 189.570, as public streets that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Pragmatically, the forum to which plaintiff seeks access would more appropriately be characterized as a non-public forum similar to, but more hazardous than, that which is described in *United States v. Kokinda*, 110 S. Ct. 3155, 3122 (1990). As a non-public forum, the standard for determining regulatory compliance with the First Amendment would be reduced to one of *reasonableness*. Section (21) of KRS 189.570 would obviously fail to satisfy that standard since it permits the most hazardous activity, solicitation of monetary contributions, to the exclusion of the less hazardous oral, visual, or written advocacy.

compared to the greater burden of proof imposed upon the state to sustain the constitutionality of a *content-based* statute, *the state is nevertheless burdened to prove* that even a content neutral statute regulating first amendment rights of free expression in a public forum must be anchored in proof of the state's intention to protect *a significant state interest*. In the instant case, that *significant interest* is the protection of motorists and pedestrians from the safety hazards arising from their joint interrelated activities while using Kentucky's roadways.

The paradox of subsection (21) and its asserted justification to promote a *significant public interest* is reflected by the state's obvious intent to condone a convenient *but more hazardous* activity in the form of pedestrian solicitations seeking instant monetary contributions from motorists momentarily stopped at heavily traveled intersections controlled by mechanical traffic signals to the exclusion of *less hazardous* traditional forms of oral, visual, or written solicitations seeking future monetary contributions, enrollment and/or membership in special interest organizations, endorsements of political, religious, or other expressions of special interest advocacy from those same motorists under identical circumstances.

The absurdity posed by this unanswerable dilemma that ignores logic and commonsense has been avoided by the panel majority's disposition.

Because a solicitation, in whatever form, be it oral, visual, or written, is defined as merely an approach with a request or plea; a move to action; a petition to entreat or importune; an urge or incentive; an endeavor to obtain by pleading; or an inducement,[2] and because existing judicial precedent including current Supreme Court pronouncements make *no distinction* between personal solicitations seeking *instant* monetary contributions and other traditional forms of oral, visual, or written

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[2] *See Webster's Third New International Dictionary* 2169 (1981).

solicitations seeking *future* monetary contributions, enrollment and/or membership in special interest organizations, endorsement of political, religious, or other expressions of special interest advocacy within a public forum except distinctions of the type posed by the factual circumstances of the instant action, namely the *degree* of the safety hazard posed by the various methods employed to implement the solicitation, coupled with the panel majority's refusal to address the inconsistency of subsection (21) and for the reasons more fully discussed herein, I must respectfully dissent.

As the panel majority has already stated, the plaintiff, Don Ater, has appealed from the grant of summary judgment in favor of the defendants, David Armstrong and Leon E. Jones, Sr., the Jefferson County executive/judge and Jefferson County police chief, respectively (Jefferson County).[3] Ater sought declaratory and injunctive relief in this action challenging the validity of a subsection of KRS section 189.570, a traffic statute that regulates pedestrians in their limited use of Kentucky's highways, roadways, and streets and which *prohibits all* pedestrian activity except the solicitation of monetary contributions while employing "a traffic control device or warning signal or an emergency vehicle as defined in KRS section 189.10 (fire engines, police cars, etc.) making use of the rotating, flashing, or oscillating red, blue, or yellow lights on such devices or vehicles," KRS 189.570(21), while in and upon the highways, roadways, and streets in Kentucky.[4]

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[3]After Ater had moved for partial summary judgment, which was denied on November 28, 1989, Jefferson County moved for partial summary judgment, which was granted on February 22, 1990 because it joined the same issues as those joined by Ater in his motion. The only remaining issue was Ater's claim of selective enforcement of the statute, which was dismissed with prejudice pursuant to the parties' consent. Fed. R. Civ. P. 41(a).

[4]KRS section 189.570 has not been accompanied by legislative history. In addition, the First Amendment applications of the statute have not been addressed by the Kentucky Supreme Court. The courts of Kentucky have interpreted this statute within the limited context of

More specifically, the plaintiff has challenged the constitutionality of subsection (21) of the enactment, which bars the distribution of literature and all other expressions of speech *except* the solicitation of monetary contributions on Kentucky's roadways when conducted with a "traffic control device or warning signal or an emergency vehicle or public safety vehicle as defined in KRS 189.910 making use of the flashing, rotating, or oscillating red, blue, or yellow lights or such devices or vehicles." Subsection (21) provides:

> No person shall stand on a highway for the purpose of soliciting contributions unless such soliciting is designated by the presence of a traffic control device or warning signal or an emergency vehicle or public safety vehicle as defined in KRS 189.910 making use of the flashing, rotating or oscillating red, blue, or yellow lights on such devices or vehicles.

KRS § 189.570(21) (Banks-Baldwin 1987).

In the complaint, Ater asserted that subsection (21) is a content-based restriction that is neither necessary to serve a compelling state interest nor narrowly drawn to achieve that end; that even if it were content neutral, it is not narrowly tailored to serve the state's legitimate interest in highway safety. He argued that subsection (21), although having the appearance of "content neutrality," its enforcement effectively converted it into "content-based" legislation with an "impermissible discriminatory motive" calculated to censor expressive activity in a public forum. Plaintiff, accordingly, has charged first and fourteenth constitutional infringements of freedom of expression.

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a pedestrian's duty to exercise due care while using the public roadways. *See, e.g., Seymour v. State Farm Mutual Insurance Co.*, 508 S.W.2d 572 (Ky. 1974); *Ellis v. Quinker*, 674 S.W.2d 34 (Ky. Ct. App. 1984). Therefore, in accordance with accepted standards of statutory construction, this court is confined to the words of the statute in deriving the intent and purpose of its enactment.

The thrust and scope of the legislative limitation imposed upon pedestrian activity and movement upon the state's roadways is more accurately reflected by the statute when it is considered in its entirety.[5]

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[5]189.570 Pedestrians

(1) Pedestrians shall obey the instruction of any official traffic control devices specifically applicable to them, unless otherwise directed by a police officer or other officially designated persons.

(2) Pedestrians shall be subject to traffic and pedestrian control signals as provided in KRS 189.231 and 189.338.

(3) At all other places, pedestrians shall be accorded the privileges and shall be subject to the restrictions stated in this chapter.

. . . .

(8) The operator of a vehicle shall yield the right of way to any pedestrian on a sidewalk.

(9) No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of vehicle which is so close as to constitute an immediate hazard.

(10) No pedestrian shall cross a roadway intersection diagonally unless authorized by official traffic control devices; and, when authorized to cross diagonally, pedestrians shall cross only in accordance with the official traffic control devices pertaining to such crossing movements.

(11) Pedestrians shall move, whenever practicable, upon the right half of crosswalks.

(12) Where a sidewalk is provided and its use is practicable, it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway.

(13) Where a sidewalk is not available, any pedestrian walking along and upon a *highway* shall walk only on a shoulder, as far as practicable from the edge of the roadway.

(14) Where neither a sidewalk nor a shoulder is available, any pedestrian walking on or along a *highway* shall walk as near as practicable to an outside edge of the roadway, and, if on a two-way *roadway*, shall walk only on the left side of the roadway.

The parties do not dispute the dispositive facts of the instant controversy. Ater, a Grand Dragon of the Realm of Kentucky Invisible Empire, Knights of the Ku Klux Klan, sought permission from Bobby Crouch, then the chief of police of Jefferson County, Kentucky, to distribute Ku Klux Klan literature while standing in the roadways of Jefferson County. He proposed to distribute the literature to motorists while using the designated flashing, rotating, or oscillating red, blue, or yellow warning lights generally used by emergency or public safety vehicles as prescribed by KRS 189.570. In a letter dated June 9, 1987, Couch advised Ater that his proposed activity was prohibited under KRS 189.570, which "regulates the use of the roadway by the pedestrians and generally prohibits a pedestrian from being in the middle of the road for any reason." In a letter dated June 30, 1987, Couch stated that the statute would be enforced "without favor to any group or person."

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(15) Except as otherwise provided in this chapter, any pedestrian upon a *roadway* shall yield the right of way to all vehicles upon the roadway.

. . . .

(19) No person shall stand in a *roadway* for the purpose of soliciting a ride.

(20) No person shall stand on a *roadway* for the purpose of soliciting employment or business from the occupant of any vehicle.

(21) No person shall stand on a *highway* for the purpose of soliciting contributions unless such soliciting is designated by the presence of a traffic control device or warning signal or an emergency vehicle or public safety vehicle as defined in KRS 189.910 making use of the flashing, rotating, or oscillating red, blue, or yellow lights on such devices or vehicles.

(22) No person shall stand on or in proximity to a street or *highway* for the purpose of soliciting the watching or guarding of any vehicle while parked or about to be parked on a *street* or *highway*.

KRS § 189.570 (Banks-Baldwin 1987).

In denying Ater's motion for partial summary judgment, the district court concluded that although not explicitly mentioned, the distribution of literature was banned by the statute. According to the district court, *all pedestrian activity*, except appropriately conducted solicitations of monetary contributions, presented potential hazards to the safety of both pedestrians and motorists on Kentucky roadways and were accordingly prohibited:

> When this statute is read in its entirety, it is clear that the legislature chose to have only one exception. Pedestrians are restricted to the sidewalk if it is available; if not, then to the shoulder. If no shoulder, they must remain as far as practicable from the edge of the road. It seems logical therefore that the statute prohibits standing or walking upon the median to distribute literature.

In addition, the district court, and now the panel majority, has decided that the statute was content neutral because the distinction between solicitation of monetary contributions and other forms of solicitation, either visual, oral, or written, in this case, the distribution of literature, was based on the type of activity, not the content or view of the speech.

To justify the constitutionality of subsection (21) of KRS 189.570, the panel majority, in affirming the lower court, reasons that

> [b]ecause the statute prohibits *all* parties from distributing literature in the roadways, and because it permits *all* parties to solicit contributions in the roadways if the precautions prescribed by subsection 21 are undertaken, the statute applies evenhandedly to all those who wish to distribute written materials or solicit funds. For example, both the Ku Klux Klan and the NAACP are barred from distributing their literature to motorists, regardless of their diverse viewpoints or the informational content of their messages. Both

> organizations, however, could solicit for contributions provided that each meets the safety requirements set forth in subsection 21 of the statute.

Ater v. Armstrong, ___ F.2d ___, ___ (6th Cir. 1992).

This conclusory, superficial reasoning is misconceived and ignores the underlying substantive issue urged by the plaintiff. The meaningful distinction which is key to the resolution of the instant controversy is not whether "the statute prohibits *all* parties from distributing literature in the roadways" and/or "permits *all* parties to solicit monetary contributions in the roadway if the parties take the precautions required by KRS 189.570(21)." Rather, the distinction to be resolved within the parameters of the statute, which is anchored in insuring a significant governmental interest in protecting the activities and movement of pedestrians and motorists from the inherently hazardous environment of Kentucky's active roadways, is the difference, if any, between the forms of the solicitation pursued and the dangers inherent to each, i.e., between the activity and movements of pedestrians who solicit by distributing literature and those pedestrians who orally solicit monetary contributions while implementing the lighting precautions imposed by KRS 189.570(21) within the inherently hazardous environment of Kentucky's active roadways. Simply stated, does the written solicitation by distributing literature as compared to word of mouth solicitation of instant monetary contributions within Kentucky's active roadways present a greater or lesser safety hazard that differ so materially as to warrant selective legislative treatment or enforcement when pedestrian-motorist interacting activity and the safety hazards inherent to each is the sole justification for suppressing first amendment rights to free expression.

Although the panel majority has avoided addressing this dispositive distinction, the Supreme Court and those circuits which have considered the issue have uniformly resolved it by balancing the relative contributing safety

hazards posed by each activity. The decisions are unanimous and are concisely summarized by the Court's decision in *United States v. Kokinda*, 110 S. Ct. 3115 (1990), recently decided in June of 1990, wherein it reaffirmed its then existing precedential pronouncements when it stated:

> Solicitation [of contributions] impedes the normal flow of traffic. See *Heffron*, 452 U.S. at 653, 101 S. Ct. at 2566-2567. Solicitation requires action by those who would respond: the individual solicited must decide whether or not to contribute (which might itself involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card. See Record, Exh. 5 (credit card receipt); see also *United States v. Belsky*, 799 F.2d 1485 (CA11 1986) ("Soliciting funds is an inherently more intrusive and complicated activity than is distributing literature."). . . . Justice Blackmun noted this distinction in his opinion concurring in part and dissenting in part to *Heffron*:
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> > "The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead, the recipient is free to read the message at a later time. . . . [S]ales and the collection of solicited funds not only require the fairgoer to stop, but also engender additional confusion . . . because they involve acts of exchanging articles for money, fumbling for and dropping money, making change, etc."

Kokinda, 110 S. Ct. at 3123-24 (quoting *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 665, 101 S. Ct. 2559, 2573 (1981) (Blackmun,

J., concurring in part and dissenting in part) (citation omitted)).[6]

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[6]The panel majority totally misconceives the legal precedent enunciated by the Supreme Court in *United States v. Kokinda*, 110 S. Ct. 3115 (1990), and the substance of this dissent.

Initially, *Kokinda* did not seek to regulate content neutral activity by denying access, as in the instant case, to traditionally *open public fora* such as public streets, parks, roadways, etc., where the government's action is *held to stricter time, place and manner regulation of speech*. Rather, *Kokinda* resulted from a denial of expressive activity by access to a *non-public fora* which had not been dedicated to First Amendment activity. The government's regulation of expressive activity within a non-public fora is examined *only for reasonableness*. *Kokinda*, 110 S. Ct. at 3118-22. The postal sidewalks in *Kokinda* did not have the characteristics of a public forum traditionally open to expressive activity as in the case confronting this appellate review.

Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 101 S. Ct. 2559 (1981), directs that "[c]onsideration of a forum's special attributes is relevant to the constitutionality of a [statute] regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Heffron*, 452 U.S. at 650-51, 101 S. Ct. at 2565. The purpose of the forum in the instant case, i.e., Kentucky's roadways, is to afford a *free, uninterrupted* and *safe* flow of motor vehicular traffic. Defendants assert that it is reasonable to restrict access to those roadways if the interaction between pedestrian and vehicular activity is *inherently dangerous*. The defendants' statement is sound only if the statute is narrowly tailored and targets and eliminates no more than the exact source of the evil it seeks to remedy: protecting pedestrians and motorists from the hazards inherent to their interacting activities while using those roadways to insure the free, normal and safe flow of vehicular traffic.

Second, *Kokinda* addressed the comparative intrusiveness of monetary solicitations (selling books, newspaper subscriptions, etc.) with other less intrusive forms of solicitation such as distributing literature and concluded that contribution solicitation was inherently the most intimidating and intrusive form of solicitation and *should be treated differently from alternative forms of solicitation and expression*:

> As residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information. One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide and act in order to respond to a solicitation. Solicitors can achieve their goal only

> by "stopping [passersby] momentarily or for longer periods as money is given or exchanged for literature" or other items. *Heffron, supra*, 452 U.S., at 653, 101 S. Ct. at 2567 (upholding stringent restrictions on the location of sales and solicitation activity).
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> * * *
>
> The regulation is premised on the Service's long experience, on the fact that solicitation is inherently more disruptive than the other speech activities it permits, and on the Service's empirically based conclusion that a case-by-case approach to regulation of solicitation is unworkable.

Kokinda, 110 S. Ct. at 3123-24.

Third, it is true, as the majority states, that five members of the Supreme Court in *Kokinda* concluded that a content-neutral distinction could be made between solicitation of contributions and distribution of literature. However, the majority fails to explain that the limited context within which the Supreme Court addressed the distinction was to identify solicitations of monetary contributions as the most intrusive of all forms of alternate visual, oral or written solicitations, including the distribution of literature. *Kokinda*, 110 S. Ct. at 3124.

Lastly, contrary to the majority's conclusory statement, this dissent does not rely upon *Kokinda* to conclude that subsection (21) of KRS 189.570 should be evaluated under a content based standard. Rather, this dissent relies upon *Kokinda* to illustrate the constitutional necessity for determining the degree of intrusiveness placed upon expressive activities by the various forms of solicitation when a specifically identified form of solicitation is the significant state interest relied upon to prohibit such activity.

In *Kokinda*, the Supreme Court evaluated a postal regulation that barred solicitation of contributions rather than distribution of literature. To determine if the regulation met the content neutral test, the Court considered whether the solicitation of contributions was disruptive of postal business. It concluded that solicitation of contributions was inherently disruptive of postal business and that the Postal Service's prohibition of solicitation of contributions was, accordingly, a valid regulation of expressive activity. The Court avoided any comment on the constitutional validity of a regulation that would deny the lesser intrusive forms of visual, oral, or written solicitation including the distributions of literature. *See Kokinda*, 110 S. Ct. at 3123.

In addition, this dissent relies upon *Kokinda* to illustrate the uniformly accepted conclusion that the solicitation of monetary contributions is one of the most hazardous and disruptive first amendment activities that may be conducted on the roadways and, accordingly, resolves that it is not narrowly tailored to support its purported legitimate state interest in highway safety. Subsection (21) of KRS 189.570 does not meet the *content neutral* test because the

Similarly, in *ACORN v. City of Phoenix*, 798 F.2d 1260, 1269 (9th Cir. 1986), the circuit court discussed "the substantial risk of disruption" in traffic control that may be presented by solicitation as opposed to other forms of expression. It noted the testimony of an expert witness at trial that "solicitation from motorists creates a potential safety hazard because the consequent distraction of the drivers poses a significant risk to motorist and pedestrian safety. Distracted drivers are more prone to automobile accidents . . . ." *ACORN*, 798 F.2d at 1270. Thus, solicitation and its attendant distraction of motorist attention not only impede the orderly flow of traffic, but raise serious traffic and public safety concerns. *ACORN*, 798 F.2d at 1269. The court distinguished solicitation from motorists and the hazards it posed from the dangers attendant upon other forms of expression directed towards motorists:

> Unlike oral advocacy of ideas, or even the distribution of literature, successful solicitation requires the individual to respond by searching for currency and passing it along to the solicitor. Even after the solicitor has departed, the driver must secure any change returned, replace a wallet or close a purse, and then return proper attention to the full responsibilities of a motor vehicle driver. The direct personal solicitation from drivers distracts them from their primary duty to watch the traffic and potential hazards in the road, observe all traffic control signals or warnings, and prepare to move through the intersection.

ACORN, 798 F.2d at 1269.

See United States Labor Party v. Oremus, 619 F.2d 683, 688 (7th Cir. 1980) (recognizing "evident dangers of

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statute permits more hazardous activity but prohibits the safer activities. As evident from the above discussion, a content neutral analysis requires the conclusion that the statute is constitutionally infirm. The content based analysis, discussed later in this dissent, rests on entirely different analytic pinnings.

physical injury and traffic disruption that are present when individuals stand in the center of busy streets trying to engage drivers and solicit contributions from them") (quotations omitted)). To permit, as subsection (21) does, the most hazardous form of free expression to the exclusion of all other less hazardous forms of free expression under identical circumstances for the ostensible significant state interest of protecting pedestrians and motorists from the hazards inherent to Kentucky's active roadways is an obvious paradox that is calculated to afford the opportunity to implement an impermissible motive to censor expressive activity in a public forum.

The error of the district court's disposition as adopted by the panel majority is more fully reflected by a review of legal precedent addressing the issues here in controversy, beginning with *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 955 (1983), in which the Supreme Court distinguished among three types of forums which have been historically available, to some degree, as platforms for freely proselytizing social, religious, political, and other advocacy: the traditional public forum; the forum created by designation; and the non-public forum. A traditional public forum is one which "by long tradition or by government fiat ha[s] been devoted to assembly and debate." *Perry*, 460 U.S. at 45, 103 S. Ct. at 955. Public streets have long been recognized as traditional public forums which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515, 59 S. Ct. 954, 963 (1939). *See also Frisby v. Schultz*, 108 S. Ct. 2495, 2499-2501 (1988); *Perry*, 460 U.S. at 45, 103 S. Ct. at 955. There can be no doubt that Ater seeks to engage in protected free speech in a public forum.[7]

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[7] Ater has standing to challenge the statute, since it "covers [his] particular conduct." *United States v. Grace*, 461 U.S. 171 (1983). *See also Daily Herald Co. v. Monro*, 838 F.2d 380 (9th Cir. 1988).

The government's ability to restrict free speech in a public forum is severely limited. Public fora represent an area within which intolerance for exhibitions or speech, petition, and assembly is at a minimum, *and the government's burden of justification is at its highest. United States v. Grace*, 461 U.S. 171, 177, 103 S. Ct. 1702, 1707 (1983); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069 (1984); *International Society for Krishna Consciousness v. City of Baton Rouge*, 876 F.2d 494, 497 (5th Cir. 1989). "The appropriate level of scrutiny is initially tied to whether the statue distinguishes between prohibited and permitted speech on the basis of content." *Frisby*, 108 S. Ct. at 2500. Content-based restrictions will be upheld only if necessary to serve a compelling state interest and narrowly tailored to serve that end. *Frisby*, 108 S. Ct. at 2500 (citing *Perry*, 460 U.S. at 45, 103 S. Ct. at 955). The government may enforce reasonable content neutral regulation of time, place, and manner of speech so long as it is "narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication." *Perry*, 460 U.S. at 45, 103 S. Ct. at 955.

Ater does not dispute that Kentucky has a legitimate interest in highway safety or that it has a legitimate interest in ensuring highway safety and free, uninterrupted traffic flow. *See Frisby*, 108 S. Ct. at 2499-2501; *Perry*, 460 U.S. at 45, 103 S. Ct. at 955. The Supreme Court has recognized that ensuring highway safety and the orderly flow of traffic justifies reasonable time, place, and manner regulation of freedom of expression. *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S. Ct. 762, 765 (1941). "Narrow and reasonable regulation of the exercise of rights designed to keep the streets open and safe for travel is not prohibited by the First Amendment." *United States Labor Party v. Oremus*, 619 F.2d 683, 688 (7th Cir. 1980) (citations omitted).

Accordingly, the thrust of plaintiff's initial argument challenges K.R.S. 189.570 subsection (21) because it is

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not narrowly tailored to serve the state's legitimate interest in highway safety, namely, the protection of motorists and pedestrians interacting within the hazardous environment of heavily-traveled intersecting roadways. *Frisby*, 108 S. Ct. at 2503; *New Jersey Citizen Action v. Edison Twp.*, 797 F.2d 1250, 1256-57 (3rd Cir. 1986).

The instant action, unlike its predecessors in time, does not seek to consider or decide the constitutional validity of facsimile time, place, and manner legislation adopted by other state or local governments designed to regulate freedom of expression by denying access to a traditional public forum for the purpose of ensuring a governmental interest of highway safety and orderly traffic flow. Rather, subsection (21) of KRS 189.570 seeks to selectively deny access to the public forum of Kentucky's roadways by appending to an otherwise constitutionally valid statute, anchored in advancing a significant governmental interest to keep its roadways open and safe for travel, a malignant exception that on its face militates against even-handed application and discriminates against other indistinguishable forms of direct communication including, but not limited to, orally propagated political or special interest views; visual advocacy in placard, banners, etc.; and distribution of literature or other means of petitioning expression while conforming with the safety lighting requirements of the enactment.

The plaintiff is a member of a public advocacy organization that encourages its members to canvass and distribute literature to motorists momentarily stopped by traffic signals at the intersection of Kentucky's roadways. The literature presumably petitions, communicates and promotes the organization's ideas, views, and activities. In contrast, a face-to-face oral solicitation of funds affords a greater opportunity for the exchange of ideas and views than is generally available in the distribution of literature, and the contributor in a response to a request for funds demonstrates an immediate general expression of support for the solicitor's views. Although the distribution of literature does not entail direct discourse between the

solicitor and donor, the distributed literature nevertheless disseminates the views and ideas of the distributor by generally urging the recipient, in this case, the motorist, and passengers, to seek additional information, membership and contributions, etc. Thus, the nexus or common denominator between solicitation of funds and the distribution of literature is the communication of ideas, views, and the advocacy of causes.

Pursuant to prevailing legal precedent, subsection (21) would, without question, satisfy existing Supreme Court mandates of time, place, and manner regulation if it uniformly prohibited all pedestrian access to the public roadways of Kentucky, including those who seek *immediate* monetary contributions between moving or stationary vehicles using those roadways, or, in the alternative, if it uniformly accommodated all citizens seeking to express political or special interest causes by written solicitation of future contributions and by other indistinguishable expressive activity including, but not limited to, oral, visual, and written advocacy in the form of petitioning by the distribution of literature.

In the instant action, the state does not dispute that oral and written dissemination of political, religious, or other special interest advocacy are protected by the First Amendment. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S. Ct. 2559, 2563 (1981). *See Schneider v. State*, 308 U.S. 147, 160, 60 S. Ct. 146, 150 (1939); *Lovell v. City of Griffin*, 303 U.S. 444, 452, 58 S. Ct. 666, 669 (1938). Nor does it claim that this protection is lost because the written materials sought to be distributed solicit contributions or are sold rather than given away, or because contributions or gifts are solicited in the course of propagating a political, religious, or other special interest. *Heffron*, 452 U.S. at 647, 101 S. Ct. at 2563.

Moreover, existing legal precedent discloses no distinction between oral, visual, or written communication that come within the orbit of First Amendment protection

including the oral, visual, and written solicitation of funds, gifts, or other forms of contributions for the propagation of a cause, whatever it may be. Simply stated, the Supreme Court has recognized all oral, visual, and written communication, including oral, visual, and/or written solicitation of funds or gifts within the context of the instant case, as effectively indistinguishable means of proselytizing the members of a selected forum entitled to equal First Amendment considerations and protections. Without exception, when the Court has considered oral, visual, and written protected expression within a hazardous environment that necessitate the time, place, and manner regulation of pedestrian and/or motor vehicular movement and activity, it has balanced the safety hazard to be assigned to the pedestrian movement and activity within the hazardous environment against a greater or lesser contributing safety factor which a legislative promulgation seeks to insure through time, place, and manner regulation of First Amendment freedoms of expressions.

Every court that has considered the comparative safety hazards and disruptions inherent to the solicitation of monetary contributions and/or the distribution of literature within an environment that mirrors the instant case has, without exception, echoed the Supreme Court's evaluations assigning greater safety risks to the face-to-face solicitation of immediate monetary contributions than to the distribution of literature.

Absent defendants' ability or effort to account for the disparate access to proselytizing accorded to the face-to-face solicitation of immediate funds as compared to oral or other forms of proselytizing, including the distribution of literature, within an identical environment and under identical precautions, it is implicit that subsection (21) of KRS 189.570 is designed to provide a contrivance for censoring expressive advocacy in a public forum and constitutes an unconstitutional infringement upon the plaintiff's, and similarly situated individual's, First Amendment rights of expressive activity.

Thus, the panel majority, even in basing its decision on the facial validity of the statute, incorrectly interprets subsection (21) to reify the statutory language so that the concepts of solicitation and distribution bear scant resemblance to the tangible activities the First Amendment was designed to protect. Both the distribution of literature and the solicitation of funds are recognized as expressive activities protected by the First Amendment. *See, e.g., Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647, 101 S. Ct. 2559, 2563 (1981); *Lovell v. Griffin*, 303 U.S. 444, 450-51, 58 S. Ct. 666, 668-69 (1938). As previously stated, solicitation and distribution are constitutionally equal means of proselytizing, and the Supreme Court has considered solicitation of funds the more hazardous of the two. *See United States v. Kokinda*, 110 S. Ct. 3115, 3123-25 (1990) ("confrontation by a person asking for money disrupts passage [more] than an encounter with a person giving out information); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 653, 101 S. Ct. 2559, 2567 (1981) (solicitation of contributions more disruptive than oral advocacy because solicitation and selling require "stopping [individuals] momentarily or for longer periods as money is given or exchanged for literature"). *See also International Society for Krishna Consciousness, Inc. v. Baton Rouge*, 876 F.2d 494, 498 (5th Cir. 1989) (ordinance prohibiting solicitation in roadway narrowly aimed at the "disruptive nature" of solicitation because the "[d]irect communication of ideas, including the distribution of literature to occupants in vehicles, is not restricted); *ACORN v. City of Phoenix*, 798 F.2d 1260, 1269 (9th Cir. 1986) ("The direct personal solicitation from drivers distracts them from their primary duty to watch the traffic and potential hazards in the road, observe all traffic control signals or warnings, and prepare to move through the intersection.").

Aside from refusing to distinguish between the activities of soliciting immediate monetary contributions and the distribution of literature for the purposes of applying this

statute, the panel majority incorrectly and unnecessarily determines that the statute was content neutral as applied because the asserted regulatory target, the safety of pedestrians and motorists on the roadway, "'happen[s] to be associated with that type of speech,'" i.e., the distribution of literature as opposed to the solicitation of funds. *Ater*, ___ F.2d at ___ (quoting *Bamon Corp. v. City of Dayton*, 923 F.2d 470, 473 (6th Cir. 1991)). Flowing from this analytical imprecision is the panel majority's erroneous conclusion that the statute, although obviously underinclusive, passes constitutional muster because Kentucky could have prohibited all pedestrian activity on its roadways. *Ater*, ___ F.2d at ___ (citing *Ward v. Rock Against Racism*, 481 U.S. 781, 800, 109 S. Ct. 2746, 2758 (1989); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975)).[8]

Within the context of applying the content neutral test to determine the constitutionality of a statute regulating expressive activity in a public forum, the type and degree

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[8]It bears noting that the cases cited by the panel majority do not support its conclusion and do not substitute for a thorough analysis of the statute's underinclusiveness.

The principle that a statute may be underinclusive and still comport with the Constitution derives from the rational relation standard of equal protection analysis. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489, 75 S. Ct. 461, 465 (1955). In the only case cited by the panel majority that involved a First Amendment challenge to a statute based on its underinclusiveness, the Supreme Court struck down the statute as being underinclusive in its regulation of the content of drive-in movie films. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214-15, 95 S. Ct. 2268, 2275 (1975). According to the Court, the underinclusive principle is simply one aspect of the "presumption of statutory validity," which has "less force when a classification turns on the subject matter of expression." *Erznoznik*, 422 U.S. at 215, 95 S. Ct. at 2275.

The Supreme Court's cited discussion in *Ward v. Rock Against Racism* is entirely inapposite to the issue under review in this case because the Supreme Court was dismissing the argument that a time, place, and manner regulation must be the least intrusive *means* of achieving the asserted governmental interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 794-800, 109 S. Ct. 2746, 2756-58 (1989). Whether a time, place, and manner regulation is impermissibly underinclusive is an entirely different inquiry from whether the means it employs are the least restrictive.

of the statute's underinclusiveness bears upon the asserted statutory aim, not the actual time, place, and manner limitations imposed by the statute. In a statute that purports to be aimed at regulating pedestrian and motorist safety on the roadways, the exclusion of one First Amendment activity from its prohibitions, i.e., solicitation of monetary contributions with warning lights, and the inclusion, within its prohibitions, of all other First Amendment activities, "raises serious doubts about whether the [the state] is, in fact, serving with this statute, the significant interests which appellee invokes in support of affirmance." *The Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2612 (1989). The activity excluded pursuant to subsection (21) from the prohibitions of KRS 189.570 in this case, as interpreted by the panel majority, is too similar to and more hazardous than the activity included within the statute's prohibition not to raise this doubt. *See Florida Star v. B.J.F.*, 109 S. Ct. at 2612 (statute prohibited publication of identity of rape victim in "instrument of mass communication"; did not prohibit publication by other means, such as word of mouth).

Finally, the nature of the activity excluded from the prohibitions of KRS 189.570 strengthens this doubt: as mentioned earlier, solicitation of monetary contributions has traditionally been considered a more hazardous First Amendment activity than distribution of literature. Under the content neutral analysis, a sufficiently uncertain statutory aim will, by necessity, defeat any conclusion that the statute is narrowly tailored since the court cannot determine whether the statute "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 108 S. Ct. 2495, 2502 (1985); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-10, 104 S. Ct. 2118, 2130-32 (1984). Subsection (21) of KRS 189.570 obviously does not target the exact source of the evil it seeks to remedy: protecting pedestrians and motorists from the hazards inherent to Kentucky's active roadways.

The panel majority concedes that the statute is underinclusive, *Ater*, ___ F.2d at ___, but fumbles on the conclusion that the subsection is unconstitutional because, in the majority's view, constitutionality is determined by an examination of "hidden motives" or "wishes" of the Kentucky legislature. *Ater*, ___ F.2d at ___. The underinclusive inquiry does not require ferreting out the subjective hidden motives and intent of the legislature; rather, the inquiry evaluates "the *facial* underinclusiveness" of the statute. *Florida Star v. B.J.F.*, 109 S. Ct. at 2612 (emphasis added).

Because this case challenges the constitutionality of the statute as interpreted by the chief of police, the panel majority need not have forayed into the realm of the statute's aim or the legislature's "motives." Mindful of the essentially indistinguishable similarities between the hazards to pedestrian and motorist safety inherent to distractions prompted by both the solicitation of contributions and the distribution of literature upon the roadways of Kentucky, the *interpretation* of subsection (21) of KRS 189.570 by the chief of police of Jefferson County, Kentucky *as applied* in denying Ater's request and Ater's resultant charges of First Amendment infringements should have been resolved by the panel majority by applying a content based evaluation to the statute. Contrary to the panel majority's conclusion, the application of this statute *does* "suffer from more covert forms of discrimination," *Ater*, ___ F.2d at ___, because the chief of police has interpreted subsection (21) in a manner that vested him with the discretionary authority to exclude particular types of speech. Uniform application of the statute dictates a uniform treatment of Ater or similarly situated individuals to roadway access to distribute literature as that accorded to individuals soliciting contributions in those identical roadways under identical circumstances. Thus, the ultimate result of the statutory interpretation of subsection (21) of KRS 189.570 in the instant action was to regulate the content of speech

and the interpretation of subsection (21) by the chief of police must be judged by a content-based standard.[9]

A statute designed to regulate expressive activity, such as particular subject matter or a certain classification of speaker, is considered to be content based and subject to an exacting standard. *United States v. Kokinda*, 110 S. Ct. 3115, 3124-25 (1990); *Consolidated Edison Co. of New York v. Public Service Commission*, 447 U.S. 530, 537, 100 S. Ct. 2326, 2333 (1980); *Widmar v. Vincent*, 454 U.S. 263, 267-70, 102 S. Ct. 269, 273-74 (1981); *Daily Herald Co. v. Munro*, 838 F.2d 380, 385 (9th Cir. 1988). Accordingly, the statute must address a compelling state interest and must be narrowly drawn to achieve that end. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 45, 103 S. Ct. at 955 (citations omitted). *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47, 106 S. Ct. 925, 928 (1986) ("regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment").

A distinction based on content may be permitted in narrow circumstances to advance a compelling state interest. *See, e.g., Lehman v. Shaker Heights*, 418 U.S. 298, 94 S. Ct. 2714 (1974) (city transit system did not

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[9]Again, the panel majority insists that this analysis focuses on the Kentucky legislature's "motive for excepting other forms of conduct from the prohibition," *Ater*, ___ F.2d at ___ n. 5, and that a "content-based motive cannot be logically inferred from this exception [for solicitation]," *Ater*, ___ F.2d at ___. No motive-based inquiry is required.

Rather, the *effect* of this exception, in combination with the discretion it hands the chief of police in determining the application of this exception, is to restrict speech on the basis of content. This nonmotive based analysis is supported by commonsense. For example, the *unpopular* speaker who brought this case had volunteered to use the rotating lights required by the section when distributing literature, but was rejected. As one might expect, and as the attorney for the plaintiff admitted during oral argument, other, more *popular* speakers have distributed literature on the Kentucky roadways, presumably without the chief of police's knowledge or permission.

have to accept partisan political advertising). *Cf. Schenck v. United States*, 249 U.S. 47, 39 S. Ct. 247 (1919). Although the "authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways" is a well-recognized significant governmental interest, *Cox v. State of New Hampshire*, 312 U.S. 569, 574, 61 S. Ct. 762, 765 (1941), there is no compelling state interest that justifies the application of subsection (21) to deny Ater, or those similarly situated, the right to distribute his literature if done within the lighting requirements of subsection (21) of the statute. Accordingly, the distinction imposed by Chief of Police Crouch was not narrowly drawn to further the purposes of the statute.

Local law enforcement officials cannot selectively designate the individuals who shall have access to the public forum, in this instance the public roadways, but must apply subsection (21) uniformly, "focusing on the abuses and dealing evenhandly" with the presence of pedestrians on the roadways with the appropriate warning lights regardless of the content of the expressive activity. *Police Dep't of City of Chicago v. Mosley*, 408 U.S. at 102, 92 S. Ct. at 2293. *See Carey v. Brown*, 447 U.S. 455, 470-71, 100 S. Ct. 2286, 2295-96 (1980); Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81 (1978). As noted by the Supreme Court, "'under the Equal Protection Clause, not to mention the First Amendment itself,' even a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215, 95 S. Ct. 2268, 2276 (1975) (quoting *Police Dep't of City of Chicago v. Mosley*, 408 U.S. at 96, 92 S. Ct. at 2290)). The government "may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. at 96, 92 S. Ct. at 2290.

The Jefferson County police chief's exclusionary application of subsection (21) violated "the fundamental principle that a state regulation of speech should be content neutral." *Widmar v. Vincent*, 454 U.S. at 277, 102 S. Ct. at 278. On the record as presented, he has failed to justify this exclusionary application under applicable constitutional standards. Thus, subsection (21) of K.R.S. section 189.750, which prohibits Ater and those similarly situated from distributing literature on the roadways when utilizing the appropriate warning lights, violates the First Amendment and is unconstitutional.

For the reasons stated above, I respectfully dissent and the judgment of the district court granting summary judgment to Jefferson County should be reversed and the case remanded to the district court for further proceedings not inconsistent with this proposed dissent.

Civil Action No. C87-0715-L(J)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

DON ATER, - - - - - - - - - - - *Plaintiff*

v.

HARVEY SLOANE, et al., - - - - - - *Defendants*

ORDER—Entered February 28, 1990

The Court having entered its memorandum opinion denying plaintiff's motion for partial summary judgment, and having entered its order granting defendants' motion for partial summary judgment, the parties having consented to entry of this order, and the Court having been sufficiently advised,

IT IS ORDERED AND ADJUDGED that plaintiff's remaining claim for selective enforcement be and hereby is voluntarily dismissed with prejudice, pursuant to Fed. R. Civ. P. 41(a).

This is a final and appealable judgment and there is no just cause for delay.

/s/ EDWARD H. JOHNSTONE
EDWARD H. JOHNSTONE, Chief Judge
United States District Court

Date: 2/28/90

Civil Action No. C87-0715-L(J)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

DON ATER, - - - - - - - - - - - *Plaintiff,*

v.

HARVEY SLOANE, et al., - - - - - - *Defendants.*

MEMORANDUM OPINION
—Entered November 29, 1989

The plaintiff, Don Ater, sought to distribute political literature while standing on or near medians in the roadways in Jefferson County, Kentucky. If there was no median, he proposed to stand in the highway using adequate warning lights. He requested permission from the defendant, Bobby Crouch, Jefferson County Chief of Police. Crouch informed him that the conduct was prohibited under Ky. Rev. Stat. 189.570 and that the statute would be enforced accordingly. Ater claims Harvey Sloane, Jefferson County Judge/Executive is responsible for Crouch's interpretation of the statute. Ater brought this action for declaratory and injunctive relief under 42 U.S.C. § 1983, claiming defendants' interpretation and enforcement of § 189.570 violates his freedom of speech provided under the first amendment to the United States Constitution and under Kentucky law. He has moved for partial summary

judgment, alleging that he is entitled to relief as a matter of law.

Ater makes two arguments. First, § 189.570 does not apply to the distribution of literature. Second, if it applies, it is not content-neutral since it prohibits the distribution of literature but not the solicitation of contributions.

Crouch and Sloane contend § 189.570 was enacted to prohibit pedestrians from entering the roadway and walking into the path of vehicles, which is precisely what they claim Ater would do if allowed to distribute literature from the median. Although defendants argue the statute must be read in its entire context, they point specifically to subsections 9, 13, 15 and 21. Finally, they argue the list of prohibitions contained in the statute is illustrative rather than exhaustive.

Pertinent provisions of the statute are as follows:

> . . .
>
> (6)(a) Every pedestrian crossing a roadway at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.
>
> . . .
>
> (c) Between adjacent intersections within the city limits of every city at which traffic control signals are in operation, pedestrians shall not cross at any place except in a marked crosswalk.
>
> . . .
>
> (9) No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close as to constitute an immediate hazard.
>
> (10) No person shall cross a roadway intersection diagonally unless authorized by official traffic control

devices; and, when authorized to cross diagonally, pedestrians shall cross only in accordance with the official traffic control devices pertaining to such crossing movements.

(11) Pedestrians shall move, whenever practicable, upon the right half of crosswalks.

(12) Where a sidewalk is provided and its use is practicable, it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway.

(13) Where a sidewalk is not available, any pedestrian walking along and upon a highway shall walk only on a shoulder, as far as practicable from the edge of the roadway.

(14) Where neither a sidewalk nor a shoulder is available, any pedestrian walking on or along a highway shall walk as near as practicable to an outside edge of the roadway, and, if on a two-way roadway shall walk only on the left side of the roadway.

(15) Except as otherwise provided in this chapter, any pedestrian upon a roadway shall yield the right of way to all vehicles upon the roadway.

. . .

(19) No person shall stand in a roadway for the purpose of soliciting a ride.

(20) No person shall stand on a roadway for the purposes of soliciting employment or business from the occupant of any vehicle.

(21) No person shall stand on a highway for the purpose of soliciting contributions unless such soliciting is designated by the presence of a traffic control device or warning signal or an emergency vehicle or public safety vehicle as defined in KRS 189.910 making use of the flashing, rotating or oscillating red, blue, or yellow lights on such devices or vehicles.

> (22) No person shall stand on or in proximity to a street or highway for the purpose of soliciting the watching or guarding of any vehicle while parked or about to be parked on a street or highway.

Section 189.010 contains key definitions. The term "pedestrian" is defined as any person afoot. The term "roadway" means that portion of a highway improved, designed or ordinarily used for vehicular travel, exclusive of the berm or shoulder. The term "median" is not defined. The court will now address the arguments.

Ater concedes that he is barred from walking *in the roadway.* However, he argues that he is not barred from standing or walking *on the median.* The court disagrees for several reasons. First, if the median and the roadway were as separate and distinct as Ater argues, the statute's prohibitions would be meaningless. Pedestrians would be permitted to do from the median what they could not do from the roadway.

Second, the list of prohibitions do not appear to be exhaustive. The statute merely sets forth four examples of proscribed activity that commonly occur from the roadway. Moreover, if the list was exhaustive, it would have been unnecessary to list the only exception. Under Ater's reasoning, its absence from the exhaustive list would mean that it is not barred.

Finally, when engaging in statutory construction, courts must give effect, if possible, to every clause and word of a statute. *Hoffman, Trustee* v. *Connecticut Department of Income Maintenance,* ___U.S.___, 57 U.S.L.W. 4915, 4916 (June 23, 1989). Statutes will be interpreted to avoid constitutional difficulties. *Frisby* v. *Schultz,* ___U.S.___, 108 S.Ct. 2495, 2501 (1988). When this statute is read in its entirety, it is clear that the legislature chose to have only one exception. Pedestrians are restricted to the sidewalk if it is available; if not, then to the shoulder. If no shoul-

der, they must remain as far as practicable from the edge of the road. It seems logical therefore that the statute prohibits standing or walking upon the median to distribute literature.

If the statute is content-neutral, time, place and manner restrictions may occur as long as the regulation is narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication. If it is content-based, the regulation must be necessary to serve a compelling state interest and be narrowly drawn to achieve that end. *Frisby,* at ___, 108 S.Ct., at 2500 (1988).

Ater argues the statute is content-based since it has an exception for the solicitation of contributions, but not the distribution of literature. He relies upon *Carey* v. *Brown,* 447 U.S. 455 (1980), and *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972). In each of those cases, the Court held that "the ordinance violated the Equal Protection Clause because it impermissably distinguished between labor picketing and all other peaceful picketing without any showing that the latter was 'clearly more disruptive' than the former." *Carey,* at 459-460 (quoting *Mosley,* at 100). *Carey* is readily distinguishable. The regulation there favored labor picketing over other types of picketing.

Ater then argues that while a firefighter can solicit contributions for the Crusade for Children under the statute here, the firefighter's partner cannot distribute flyers explaining the purpose of the Crusade. By the same token, he argues while he is permitted to solicit contributions for his organization, he cannot distribute literature explaining its views. By his own admission, the distinction is based on the type of activity, not the content or view of the speech. Everyone engaged in the solicitation of contributions is treated identical regardless of the content of their speech or views. The same is true for those wishing to distribute literature. The statute is content-neutral.

The next question is whether the statute is narrowly tailored to further a significant government interest. Ater acknowledges that Kentucky has an interest in furthering roadway safety and that the interest is significant enough to ban pedestrians from the roadway. He argues the statute is not narrowly tailored because it allows solicitors in the road, but not others. The court disagrees. Simply because the legislature chose to open the roadway to pedestrians for one activity does not mean it has to open the roadway to any and all activities. The test is whether the statute targets and eliminates no more than the exact source of the evil it seeks to remedy. *Frisby*, at ___, 108 S.Ct., at 2495. This test is satisfied. The exact source of evil is pedestrians in the roadway. The statute eliminates no more.[1] Compare *The Enterprise, Inc.* v. *U.S.*, 833 F.2d 1216 (6th Cir. 1987), here the court stated that the first amendment is not violated merely because content-neutral regulation raises the cost of one avenue of communication or prevents use of one mode of communication where others exist.

The final question is whether the restrictions leave open ample alternative channels of communication. Ater can distribute literature from the sidewalk, through the mails or by walking door-to-door. He can contact residents by telephone. He is free to obtain a permit and march in the roadway. This last instance gives him access to the roads while also providing the police with an opportunity to

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[1]Ater's argument seems to focus on whether the statute's ban is underinclusive rather overinclusive. The Supreme Court has frequently upheld underinclusive classifications on the theory that a legislature may deal with one part of a problem without addressing all of it. This is particularly true where the classification is content-neutral. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 215, 95 S.Ct. 2268, 2275 (1975); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-465 (1955).

guarantee the safety of the marchers by restricting motorists. The statute leaves him ample alternatives.

In sum, § 189.570 prohibits pedestrians from standing or walking in the roadway. Thus, Ater is barred from standing or walking in the median to distribute literature. He is restricted to the sidewalk, shoulder, or outside edge of the roadway. When crossing the street, he is restricted to the right half of the crosswalk, if available. The only exception is to solicit contributions, provided adequate warning lights are utilized. The time, place, and manner restrictions are reasonable and the regulation is content-neutral, narrowly tailored to serves significant governmental interest and leaves open ample alternative channels for communication of information.

Accordingly, Ater's motion for partial summary judgment is denied. An appropriate order accompanies this opinion.

/s/ JOHNSTONE
EDWARD H. JOHNSTONE, Chief Judge
United States District Court

Dated 11/28/88